Supreme Court, U.S.
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No.___

IN THE

Supreme Court of the United States

YSLETA DEL SUR PUEBLO, *et al.*,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS M. DIAMOND, JR.*
DIAMOND RASH GORDON & JACKSON, P.C.
300 East Main Drive
Seventh Floor
El Paso, Texas 79901
(915) 533-2277

* Counsel of Record

Attorneys for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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QUESTIONS PRESENTED

1. Does the Indian Gaming Regulatory Act, instead of the Pueblo's Restoration Act, govern gaming activities on the reservation lands of the Ysleta del Sur Pueblo?

2. If not, should the gaming provisions of the Pueblo's Restoration Act be interpreted consistently with this Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) thus preventing a grave miscarriage of justice?

LIST OF PARTIES

State of Texas

John Cornyn,
Attorney General

Ysleta del Sur Pueblo,
a federally recognized Indian tribe, 25 U.S.C. § 1300g *et seq.*

Tigua Gaming Agency,
a regulatory agency of the Pueblo

Tribal Council,
the governing body of the Pueblo, 25 U.S.C. § 1300g-3(b)

Albert Alvidrez,
Tribal Governor

Carlos Hisa,
Lieutenant Governor

Francisco Hernandez,
Gaming Commissioner

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF AUTHORITIES	v
STATEMENT OF JURISDICTION	1
OPINIONS AND ORDERS BELOW	2
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
Overview	3
Petitioners	4
The Recognition Act of 1968	5
The Restoration Act	6
IGRA	7
Ysleta I	8
Pueblo's Gaming Activities	10
Ysleta II—the Present Action	11
ARGUMENT	
This Court should issue the writ of certiorari in order to correct a grave miscarriage of justice	14
A. The Fifth Circuit committed fundamental errors in *Ysleta I* by holding that the Pueblo's Restoration Act and not IGRA governs gaming activities of the Pueblo's reservation	15

TABLE OF CONTENTS—Continued

Page

B. The Fifth Circuit's construction of the Restoration Act's scope of gaming provision in *Ysleta I* constitutes an unconstitutional advisory opinion..... 20

C. The Fifth Circuit committed fundamental errors in *Ysleta I* by holding that Congress did not enact the gaming provisions of the Restoration Act with an eye towards Cabazon..... 21

D. The district court and the Court of Appeals below compounded the errors in *Ysleta I* by expounding upon the Fifth Circuit's dicta that Congress did not enact the gaming provisions of the Restoration Act with an eye towards Cabazon. 25

CONCLUSION..... 26

APPENDIX..... 1a

TABLE OF AUTHORITIES

CASES

	Page
Brown v. GSA, 425 U.S. 820 (1976)	16
Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976)	12, 13, 21
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987)	9, 12, 13, 21
Chicago & N. W. Tr. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981)	14
Confederated Tribes of Colville Reservation v. Washington, 938 F.2d 146 (9th Cir. 1991)	22
Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437 (1987)	16
District of Columbia v. Hutton, 143 U.S. 18 (1892)	15
Florida v. Seminole Tribe of Florida, 181 F.3d 1237 (11th Cir. 1999)	8
Green v. Bock Laundry, 490 U.S. 504 (1989)	22
Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 743 F. Supp. 645 (W.D. Wis. 1990)	18
Miles v. Apex Marine Corp., 498 U.S. 19 (1990)	22
Posadas v. Nat'l City Bank, 296 U.S. 497 (1936)	16
Pueblo of Santa Ana v. Hodel, 663 F. Supp. 1300 (D.D.C. 1987)	22
Quechan Indian Tribe v. McMullen, 984 F.2d 304 (9th Cir. 1993)	22
Radzanower v. Touche Ross & Co., 426 U.S. 148 (1976)	16
Rhode Island v. Narragansett Indian Tribe, 19 F.3d 685 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994)	18-19
Rodriguez v. United States, 40 U.S. 522 (1987)	17

TABLE OF AUTHORITIES—Continued

Page

Sisseton-Wahpeton Sioux Tribe v. United States, 718 F. Supp. 755 (D.S.D. 1989), rev'd on other grounds, 897 F.2d 358 (8th Cir. 1990) 7

Sycuan Band of Mission Indians v. Roache, 54 F.3d 535 (9th Cir. 1994), cert. denied, 516 U.S. 912 (1995) 18

Texas v. Ysleta del Sur Pueblo, 237 F.3d 631(5th Cir. 2000), cert. denied, 121 S. Ct. 2216 (2001) (unpublished) 13

Texas v. Ysleta del Sur Pueblo, No. EP-CA0320-GTE (W.D. Tex. Sept. 27, 2001), affirmed, *Texas v. Ysleta del Sur Pueblo*, No. 01-51129 (5th Cir. Jan. 17, 2002) ("*Ysleta II*") 4

Texas v. Ysleta del Sur Pueblo, No. 01-51129 (5th Cir. Jan. 17, 2002) ("*Ysleta II*") 4

United Keetoowah Band of Cherokee Indians v. Oklahoma, 927 F.2d 1170 (10th Cir. 1991) 18

United States v. Sandoval, 231U.S. 28 (1913) 14

United States v. Tynen, 78 U.S. 88 (1870) 15

Williams v. Lee, 358 U.S. 217 (1959) 14

Ysleta del Sur Pueblo v. Texas, 79 F. Supp. 2d 708 (W.D. Tex. 1993), rev'd, 36 F.3d 1325 (5th Cir. 1994), cert. denied, 514 U.S. 1016 (1995) 9

Ysleta del Sur Pueblo v. Texas, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), cert. denied, 514 U.S. 1016 (1995) 4, 9, 10, 15-17, 20, 23-24

U.S. CONSTITUTION

U.S. Const art. III, § 2 20

TABLE OF AUTHORITIES—Continued

STATUTES

Page

Federal

15 U.S.C. § 1171 17
18 U.S.C. § 13 18
18 U.S.C. § 1162 12
18 U.S.C. §§ 1166 et seq 7
25 U.S.C. §§ 731 et seq 7, 19
25 U.S.C. § 737 19
25 U.S.C. § 941*l* 1300g 19
25 U.S.C. §§ 1300g *et seq* 4, 7
25 U.S.C. § 1300g-1 7
25 U.S.C. § 1300g-3(b) 4, 22
25 U.S.C. § 1300g-4(f) 7
25 U.S.C. § 1300g-6 ..... 2, 7, 10, 17
25 U.S.C. § 1300g-6(a) 9, 10, 15, 21
25 U.S.C. § 1300g-6(b) 10, 12, 13, 26
25 U.S.C. § 1300g-6(c) 10, 15
25 U.S.C. § 1708(b) 19
25 U.S.C. §§ 2701-21 ..... 4, 7
25 U.S.C. § 2701(1) & (4) 8
25 U.S.C. § 2701(3) 8
25 U.S.C. § 2701(5) 17
25 U.S.C. § 2702 8
25 U.S.C. § 2702(1) 17
25 U.S.C. § 2702(3) 16
25 U.S.C. § 2703(6)-(8) 7
25 U.S.C. §§ 2705 & 2706 8
25 U.S.C. § 2710(b)(1)(A) 17
25 U.S.C. § 2710(d)(1) 7, 9
25 U.S.C. § 2710(d)(1)(B) 17
25 U.S.C. § 2710(d)(7) 8
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 10

TABLE OF AUTHORITIES—Continued

	Page
Pub. L. No. 100-89, 101 Stat. 666 (1987)	7
Pub. L. No. 90-287, 82 Stat. 93 (1968)	5
STATE	
Act of May 23, 1967, 60th Leg., Reg. Sess., ch. 277, 1967 Gen. Laws. 666	5
Tex. Civ. Prac. & Rem. Code Ann. §§ 125.001 *et seq.* (Vernon 1997, Pamp. 2001)	12
LEGISLATIVE MATERIAL	
113 Cong. Rec. H 23,305 (1968)	6
133 Cong. Rec. 2,676 (1987)	25
133 Cong. Rec. 20,957 (1987)	21, 23
133 Cong. Rec. 22,114 (1987)	25
S. Rep. No. 90-1070, 90th Cong., 2d Sess (1968)	5
S. Rep. No. 446, 100th Cong., 2d Sess. 35, *reprinted in* 1988 U.S.C.C.A.N. 3071	8, 17
Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344, before the Select Committee on Indian Affairs, 99th Cong. 2d Sess. (1986)	6
SECONDARY SOURCES	
Op. Tex. Atty. Gen. No. JM-17 (1983)	6
Op. Tex. Att'y Gen. No. DM-32 (1991)	8
Robert L. Stern et al., Supreme Court Practice (7th ed. 1993)	14
18 C. Wright & K. Graham, Federal Practice and Procedure (1981)	20

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PETITION FOR A WRIT OF CERTIORARI

Come now Ysleta del Sur Pueblo, the Tigua Gaming Agency, the Tribal Council, Albert Alvidrez, Carlos Hisa, and Francisco Hernandez seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, and would respectfully show unto the honorable Court as follows:

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit was entered on 17 January 2002, Appendix at 1a. The motions for rehearing and rehearing en banc were denied on 13 February 2002, Appendix at 3a. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

OPINIONS AND ORDERS BELOW

Petitioners appealed seven Orders of the United States District Court for the Western District of Texas: (1) the 2 December 1999 Order Regarding Defendants' Motion to Dismiss except those matters relating to tribal sovereignty, Appendix at 5a; (2) the 17 December 1999 Order that Defendants File their Answer except for those matters relating to tribal sovereignty; (3) 13 January 2000 Order Denying Defendants' Second Motion to Dismiss except for those matters relating to tribal sovereign immunity, Appendix at 17a; (4) the 27 September 2001 Order Granting Summary Judgment and Injunction, Appendix at 25a; (5) the 27 September 2001 Order Denying Defendants' Motion for Summary Judgment, Appendix at 30a; (6) the 2 November 2001Order Denying Defendants Motion for New Trial and Motion to Amend Judgment; and (7) the 6 November 2001 Order re: Attorney's Fees and Costs. The 2 December Order and supporting Opinion are reported at 79 F. Supp. 2d 708 (W.D. Tex. 1999). None of the others are reported, and neither is the opinion of the Fifth Circuit affirming the district court's rulings, Appendix at 2a.

STATUTORY PROVISIONS

The primary statutory provision at issue is set out below.

25 U.S.C. § 1300g-6 Gaming activities

(a) In general

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe. Any violation of the prohibition provided in this subsection shall be subject to the same civil and criminal penalties that are provided by the laws of the State of Texas. The provisions of this subsection are enacted in accord-

ance with the tribe's request in Tribal Resolution No. T.C.-02-86 which was approved and certified on March 12, 1986.

(b) No State regulatory jurisdiction

Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas.

(c) Jurisdiction over enforcement against members

Notwithstanding section 1300g-4(f) of this title, the courts of the United States shall have exclusive jurisdiction over any offense in violation of subsection (a) of this section that is committed by the tribe, or by any member of the tribe, on the reservation or on lands of the tribe. However, nothing in this section shall be construed as precluding the State of Texas from bringing an action in the courts of the United States to enjoin violations of the provisions of this section.

Other pertinent statutory provisions are set out a pages 81a-89a of the Appendix.

STATEMENT OF THE CASE

Overview

This case asks whether the federal courts can deny the rights and privileges accorded Indian tribes by an express act of Congress. Petitioners are the Ysleta del Sur Pueblo ("Pueblo"), its agencies, and its tribal officials. The Pueblo is a small, impoverished, federally recognized Indian tribe in west Texas which has been fighting to continue its culture and existence. Since 1993, it has maintained and operated the Speaking Rock Casino and Entertainment Center ("Speaking Rock" or "Casino") on tribal lands in El Paso, Texas in an attempt to better the lives of its members.

Initially, the Pueblo sought to operate the Casino in accordance with the provisions of the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701-21 ("IGRA"). However, in a prior case the Fifth Circuit held that the gaming activities of the Pueblo are not subject to this comprehensive scheme, but rather to an earlier 1987 act that restored the Pueblo's federal trust status, 25 U.S.C. §§ 1300g *et seq.* (the "Restoration Act"). *Ysleta del Sur Pueblo v. Texas*, 36 F.3d 1325 (5th Cir. 1994) ("*Ysleta I*"), cert. denied, 514 U.S. 1016 (1995).

The courts below in this case have further interpreted the Restoration Act—in contrast to the principles of IGRA—as prohibiting the Pueblo from engaging in any gaming activity that would not be permissible for an ordinary citizen of Texas. By their action, the full panoply of state regulation with respect to gaming would now apply to activities on the Pueblo's reservation. On this basis, the district court entered a permanent injunction requiring the closure of the casino, *Texas v. Ysleta del Sur Pueblo*, No. EP-CA0320-GTE (W.D. Tex. Sept. 27, 2001) ("Memorandum Opinion"), Appendix at 31a, and the Fifth Circuit affirmed in an unpublished, one-sentence opinion. *Texas v. Ysleta del Sur Pueblo*, No. 01-51129 (5th Cir. Jan. 17, 2002) ("*Ysleta II*"), Appendix at 2a.

The 1994 decision in *Ysleta I* is fundamentally flawed and should be corrected because its application by the courts in *Ysleta II* inflict a grave miscarriage of justice on this tribe in contravention of federal trust responsibilities.

Petitioners

Petitioner Ysleta del Sur Pueblo is a federally recognized Indian tribe whose reservation is in El Paso County, Texas. See 25 U.S.C. §§ 1300 *et seq.* Petitioner Tribal Council is the governing body of the Pueblo. 25 U.S.C. § 1300g-3(b). Petitioner Albert Alvidrez is the Tribal Governor and a member of the Tribal Council and is sued as such. Petitioner

Carlos Hisa is the Tribal Lieutenant Governor and a member of the Tribal Council and is sued as such. Petitioner Tigua Gaming Agency is a tribal agency charged with regulating the Pueblo's gaming activities. Petitioner Francisco Hernandez is the Pueblo's Gaming Commissioner, i.e. head of the Tigua Gaming Agency, and is sued as such.

The Recognition Act of 1968

The Tigua Indians who comprise the Ysleta del Sur Pueblo trace their roots in the El Paso area back more than three centuries. The Pueblo became a federally recognized Indian tribe in 1968, when Congress passed the Tiwa Indians Act, Pub. L. No. 90-287, 82 Stat. 93 (1968). In that legislation, Congress simultaneously transferred responsibility for the Tiguas to the State of Texas: "[T]he Indians now living in El Paso County, Texas, who are descendants of the Tiwa Indians of the Ysleta (Isleta) del Sur Pueblo settling in Texas at Ysleta in 1682, shall, from and after the ratification of this Act, be known and designated as Tiwa Indians of Ysleta, Texas[.]" Section 2 of the Recognition Act provided that "[r]esponsibility, if any, for the Tiwa Indians of Ysleta del Sur is . . . transferred to the State of Texas." The State of Texas had previously passed legislation agreeing to accept "a transfer of the trust responsibilities of the United States respecting the Tigua Indian Tribe." Act of May 23, 1967, 60th Leg., Reg. Sess., ch. 277, 1967 Gen. Laws. 666.

The purpose of the Act was "to overcome the lack of authorization in the State constitution to treat Indians differently than other citizens[.]" See S. Rep. No. 90-1070, 90th Cong., 2d Sess. at 1 (1968). Congressman Richard White from El Paso, sponsor of the legislation, identified the circumstances which made the legislation necessary:

> The city of El Paso has grown up around them and is threatening to swamp their holdings. . . .

> [T]he Tiwa Indians have suffered extreme conditions of poverty and hardships. Many of the Tiwa Indian children are uneducated and in most instances lack the normal bare necessities of life such as shoes and clothing. . . . .
>
> The average annual income of these people is $400 per year. . . . They are now faced with the problem of paying between $80 and $100 per year city taxes on their small adobe shacks. It is impossible for them to pay these high taxes and as a result every Tiwa home is in tax foreclosure.

113 Cong. Rec. H 23,305 (1968).

The Restoration Act

Despite its acceptance of the transfer of trust responsibilities, Texas undertook actions in the early 1980's which threatened the continued existence of the Pueblo as well as that of the Alabama and Coushatta Indian Tribes of Texas which were in a similar position as the Pueblo. In 1983 the Attorney General of Texas opined that the acceptance of the trust responsibilities by the State was unconstitutional and the trust was dry, that under Texas law the Indian tribes were but private associations, and that all the laws of the State applied on their reservations. *See* Op. Tex. Atty. Gen. No. JM-17 (1983). Armed with the Attorney General's opinion, the State undertook actions adverse to the well-being of the tribes. *See* pertinent portions of the written statement of Raymond D. Apodaca, Executive Director of the Texas Indian Commission, as recorded in Restoration of Federal Recognition to the Ysleta del Sur Pueblo and the Alabama and Coushatta Indian Tribes of Texas: Hearing on H.R. 1344, before the Select Committee on Indian Affairs, 99th Cong. 2d Sess. 60-64 (1986), Appendix at 90a.

The two tribes beseeched Congress to protect them from the actions of the State. On August 18, 1987, the United States Congress restored the Federal trust relationship between the United States and the Pueblo and the Alabama and Coushatta Indian Tribes of Texas . See Pub. L. No. 100-89, 101 Stat. 666 (1987) (codified at 25 U.S.C. §§ 1300 *et. seq.* with respect to the Pueblo, and 25 U.S.C. §§ 731 *et seq.* for the Alabama and Coushatta Indian Tribes). The new designation of the Pueblo is the Ysleta del Sur Pueblo. 25 U.S.C. § 1300g-1. Although the Act granted the State of Texas Public Law 280 type jurisdiction over the Pueblo's reservation, 25 U.S.C. § 1300g-4(f), it also contained specific provisions limiting the extent of that jurisdiction over gaming activities by the Pueblo. See 25 U.S.C. § 1300g-6.

IGRA

In 1988, Congress created a nationwide, federal regulatory system governing gaming on Indian land, known as the Indian Gaming Regulatory Act ("IGRA"), codified at 25 U.S.C. §§ 2701-21 and 18 U.S.C. §§ 1166 *et seq.* IGRA divides gaming into three classes. Class III gaming is gaming that is neither social or traditional Class I gaming, nor within the various bingo, pull tab, and card games which are authorized as Class II gaming under the statute. *See* 25 U.S.C. § 2703(6)-(8). Class III gaming on Indian land is lawful if authorized by a tribe located in a state which "permits such gaming for any purpose by any person, organization or entity," and if "conducted in conformance with a Tribal-State compact entered into by the Indian tribe." 25 U.S.C. § 2710(d)(1).

IGRA "is a comprehensive and pervasive piece of legislation that in many respects preempts other federal laws that might apply to gaming." *Sisseton-Wahpeton Sioux Tribe v. United States*, 718 F. Supp. 755, 758 (D.S.D. 1989), rev'd on other grounds, 897 F.2d 358 (8th Cir. 1990). Congress

enacted IGRA as the national policy on Indian gaming because existing federal law "[did] not provide clear standards or regulations for the conduct of gaming on Indian lands. . . ." 25 U.S.C. § 2701(3). Congress specifically recognized that gaming was an important "means of generating tribal governmental revenue," and that "a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government. . . ." 25 U.S.C. § 2701(1) & (4). Moreover, Congress left to the federal government responsibility for the enforcement of IGRA and established the National Indian Gaming Commission for that purpose. 25 U.S.C. §§ 2705 & 2706. Congress intended IGRA "'to expressly preempt the field in the governance of gaming activities on Indian lands.'" *Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1248 n. 16 (11th Cir. 1999) (quoting S. Rep. No. 100-446 at 6, reprinted in 1988 U.S.C.C.A.N. at 3076). IGRA, by its terms, governs all tribes that have jurisdiction over their reservation lands. 25 U.S.C. § 2702.

Ysleta I

The Attorney General of Texas, in responding to a query whether enactment of legislation permitting class III gaming within Texas waters would permit such gaming on Indian lands located in the State, specifically opined that under the "last in time" rule of statutory construction, the provisions of the IGRA would prevail over the earlier enacted Restoration Act. See Op. Tex. Att'y Gen. No. DM-32 (1991). Given the Attorney General's opinion, the Pueblo attempted to engage the governor of Texas in negotiations for a Tribal-State Compact for more than a year. In 1993 the Pueblo sued the State of Texas and, in the alternative, its governor seeking a declaration that the State had failed to negotiate in good faith for a compact, and an order granting the Pueblo the specific remedies provided by IGRA. 25 U.S.C. § 2710(d)(7). The State and its governor moved to dismiss

the Pueblo's complaint, claiming that the Tenth and Eleventh Amendments barred suit. The district court denied the motion.

In cross-motions for summary judgment, the parties raised the issue of whether IGRA or the Restoration Act determined the scope of permissible gaming activities on the Pueblo's reservation. The Pueblo argued that section 2710(d)(1) of IGRA determined the scope of gaming activities subject to a Tribal-State compact. The State accepted that regulatory provisions of IGRA were applicable but argued, despite the Attorney General's prior opinion, that section 1300g-6(a) of the Restoration Act controlled the scope of gaming determination. *Ysleta I* at 1331. The Pueblo countered that under either section the result was the same, both being premised on *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). *Ysleta I* at 1332. Neither party argued that the Restoration Act, instead of IGRA, governed gaming on the Pueblo's reservation.

The district court granted the Pueblo's motion for summary judgment holding the requested gaming activities of baccarat, blackjack, "craps" (dice), roulette, and slot machines were permitted under Texas law and thus were a proper subjects for the tribal-state negotiations contemplated by IGRA. *Ysleta del Sur Pueblo v. Texas*, 852 F. Supp. 587 (W.D. Tex. 1993). The State and its governor appealed. The parties presented the same arguments on appeal.

In reversing the district court, the Fifth Circuit relied on new and independent arguments not asserted by any of the parties. In Part III of its opinion, the panel examined (A) the application of *Cabazon Band* to the gaming provisions of the Restoration Act, (B) the conflict between the Restoration Act and IGRA and the controlling force of the Restoration Act, and (C) the Restoration Act's failure to abrogate the Eleventh Amendment immunity of the State.

Although the court wrote in Part III(A) of its opinion that Congress did not enact the Restoration Act with an eye towards *Cabazon*, *Ysleta I* at 1333-34, it left open the question whether IGRA incorporates *Cabazon* with regard to Class III gaming. *Ysleta I* at 1337 n. 17. The only conflict found between the two statutes is set out in Part III(B) of its opinion, where the court concluded that Restoration Act and IGRA have different enforcement regimes because the Restoration Act allows the State to pursue a remedy for injunction. *Ysleta I* at 1334.

Finding that the Restoration Act is a specific statute while IGRA is a general one, the court held in Part III(B) of its opinion that the Restoration Act governs the determination whether the Pueblo's gaming activities are allowed under Texas law. *Ysleta I* at 1335. In Part III(C) of its opinion, the panel held that the Restoration Act did not abrogate the State's Eleventh Amendment immunity. *Ysleta I* at 1335-36. The panel instructed the district court to dismiss the Pueblo's suit for lack of jurisdiction. *Ysleta I* at 1336. The Fifth Circuit decided an issue that was never pled, briefed, or argued: that the Restoration Act, and not IGRA, governs gaming on the Pueblo's reservation. The Fifth Circuit effectively denied the Pueblo its day in court

Pueblo's Gaming Activities

Prior to the Fifth Circuit's ruling, the Pueblo, in good faith and with full knowledge of the State of Texas, commenced Class II gaming activities on its lands under the auspices of the National Indian Gaming Commission ("NIGC"), the federal regulatory body created by IGRA. Texas was aware of and did not object to the NIGC's oversight of the Tribe's Class II gaming activities. The State participated in activities necessary for the NIGC to approve the Class II management agreement. The State also offered to negotiate a compact pursuant to IGRA for Class III lottery and pari-mutuel racing.

At the time of the Pueblo's suit in 1993, a majority of the families of the 1300-member Pueblo were impoverished. A March 1993 income analysis of tribal members indicated that 68% of the heads of households had less than $15,000 in annual income, with and additional 16% earning less than $5,000 annually. See the affidavit of Miguel Pedraza, set out at pages 92a of the Appendix, which was filed with the Fifth Circuit in the *Ysleta I* appeal in support of the Pueblo's Motion for Expedited Appeals Procedures. The Pueblo looked to gaming revenue to improve the lives of its members and has continued its gaming activities believing such are not "prohibited under the laws of the State of Texas." *See* 25 U.S.C. § 1300g-6(a). Not only has the Pueblo and its members experienced significant economic and social improvement due to the Pueblo's gaming activities, but so has the surrounding community of El Paso, Texas, and particularly its minority population. See Executive Summary of "An Evaluation of the Economic Impact of Speaking Rock Casino" by Everett G. Dillman (November 1999).[1] Appendix at 95a.

Ysleta II - the Present Action

The Attorney General of Texas filed an Original Complaint for Injunctive Relief on September 27, 1999, bringing a federal cause of action pursuant 25 U.S.C. § 1300g-6 to enjoin Pueblo-sponsored gaming activities on its reservation. Jurisdiction in the district court was asserted under 25 U.S.C. § 1300g-6(c) and under 28 U.S.C. § 1331.

Defendants (the Petitioners here) filed their Motion to Dismiss based upon their tribal-sovereign immunity, and because the Attorney General lacks authority to prosecute the action on behalf of the State. The district court denied the

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[1] The entirety of the Dillman report was attached to the Pueblo's Motion for Summary Judgment.

motion to dismiss on the basis of sovereign immunity (the "December Order"), Appendix at 5a, but also ordered the Attorney General to replead and specify his authority to prosecute this action. In footnote 13 of its December Order, the district court suggested that the Attorney General use the Texas Common Nuisance Statute as his authority to bring suit.

On December 16, 1999, the Attorney General filed his First Amended Complaint. The next day the district court ordered Defendants to file their answer. They first filed a Supplemental Rule 12(b) Motion to Dismiss, contending that the Attorney General did not simply specify his authority in the new pleading, but that he also brought a new state law claim by requesting that Defendants be enjoined pursuant to the Texas Nuisance Statutes, Tex. Civ. Prac. & Rem. Code Ann. §§ 125.001 *et seq.* (Vernon 1997, Pamp. 2001). Defendants argued that whatever abrogation of immunity might be contained in Section 1300g-6, it did not extend to the state law claim, and that Section 1300g-6(b) specifically prohibited the assimilation of such laws.

The district court denied the Supplemental Motion to Dismiss on January 13, 2000 (the "January Order"). Appendix at 17a. The court held all state gambling laws, which include the nuisance statute, become federal law for purposes of reservation gambling, and thus Chapter 125 constituted sufficient authority for the Attorney General to seek injunctive relief under the Restoration Act. The court justified the complete assimilation of Texas law in footnote 5 of its opinion:

> Section 1300g-6(b) appears to have been derived from two United States Supreme Court opinions. *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987); *Bryan v. Itasca Cty., Minnesota*, 426 U.S. 373 (1976). Although the Supreme Court in those cases determined that Public Law 280 (18 U.S.C.

> § 1162) did not grant to certain states general civil regulatory authority over tribal reservations, it also held that such authority could be granted where expressly provided by Congress. *See Cabazon*, 480 U.S. at 214-15; *Bryan*, 426 U.S. at 383-85. These cases reinforce the notion that Congress' grant to the State of Texas to exercise regulatory authority over gambling on the Tribe's reservation was valid. See *Cabazon*, 480 U.S. at 207 (discussing plenary powers of Congress over tribes).

(emphasis added). The district court turned the law on its head by construing an explicit, statutory prohibition as a specific grant of authority to the State. Section 1300g-6(b) reads, "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas."

Defendants appealed both orders. The Fifth Circuit affirmed the decision on the waiver of immunity from suit. See *Texas v. Ysleta del Sur Pueblo*, 237 F.3d 631, cert. denied, 121 S. Ct. 2216 (2001) (unpublished).

Defendants filed their Original Answer denying the State's allegations and the Pueblo counterclaimed seeking a declaration (1) that the Pueblo may engage in any game of prize, chance, and consideration in which the State or any person may engage, and (2) that the Pueblo's gaming activities are not prohibited. The State filed a Motion for Summary Judgment on its claims against all Defendants. Defendants responded with considerable evidence in opposition to the State motion. Defendants filed their Motion for Summary Judgment on the Pueblo's counterclaim with evidence supporting the counterclaim.

On September 27, 2001, the district court entered its Order Granting Summary Judgment and Injunction in favor of the State, as well as its Order Denying Defendant's Motion for Summary Judgment. In its Memorandum Opinion, the district court adopted and applied the earlier conclusion of

law in its January Order concerning the complete assimilation of Texas laws. The court later awarded the State its attorney's fees based on the same reasoning. The Fifth Circuit affirmed the district court's rulings in all respects.

ARGUMENT

This Court should issue the writ of certiorari in order to correct a grave miscarriage of justice.

Although it has been reiterated that this Court is not primarily concerned with correcting errors in lower court decisions, this Court has accepted cases for review for no other apparent reason. Robert L. Stern *et al.*, Supreme Court Practice 193 (7th ed. 1993) ("Stern"). The commentators describe *Chicago & N. W. Tr. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) as a case in which certiorari was granted for no reason other than an obviously incorrect application of the federal pre-emption doctrine. Stern at 192. This case involves many obvious and egregious errors including the misapplication of the pre-emption doctrine in Indian jurisprudence, the misapplication of rules determining which of the conflicting provisions of different statutes governs, the misuse of rules of statutory construction, the misuse of legislative history, and the abuse of the opinion writing process in violation of Constitutional strictures. It also involves an Indian tribe which faces catastrophic injury because these fundamental errors have granted the State of Texas regulatory power over the Pueblo's reservation despite a specific Congressional prohibition. In *Williams v. Lee*, 358 U.S. 217, 218 (1959), certiorari was granted because of a "doubtful determination" by the court below "of the important question of state power over Indian affairs."

Nor should this Court be dissuaded from granting the writ because it failed to do so in *Ysleta I.* In *United States v. Sandoval*, 231U.S. 28, 48 (1913) this Court decided that it was not bound by previous language it had employed in

describing the status of Indian Pueblos because its "observations . . . were evidently based upon statements in the opinion of the territorial court, then under review, which are at variance with other recognized sources of information, now available[.]" In *Ysleta I*, the Fifth Circuit requested post-argument that the Pueblo provide it with the legislative history of the Restoration Act and thereafter began sifting it for support of its decision. The Pueblo was not accorded the opportunity to brief or argue the significance of the legislative process by which the House concurred in the Senate's amendment of the act. In the present case, the Pueblo did have the opportunity to explain the controlling significance of the House rules and the actions of the Committee Chairman. The district court, however, decided it was bound by the decision in *Ysleta I* and the Fifth Circuit would not even bother writing on the issue in affirming the district court.

A. The Fifth Circuit committed fundamental errors in *Ysleta I* by holding that the Pueblo's Restoration Act and not IGRA governs gaming activities of the Pueblo's reservation.

In Part III(B) of its opinion in *Ysleta I*, the Fifth Circuit found that the ability of the State of Texas to file suit in federal court under 25 U.S.C. § 1300g-6(c) to enjoin a violation of the provisions of 25 U.S.C. § 1300g-6(a) constituted an enforcement procedure fundamentally at odds with the concepts of IGRA. 36 F.3d at 1334. Instead of enforcing the provisions of IGRA as the more recent of the two statutes, *see United States v. Tynen*, 78 U.S. 88, 92 (1870), and, *District of Columbia v. Hutton*, 143 U.S. 18, 26 (1892), the court held that IGRA, as a general statute, could not impliedly repeal the terms of the earlier enacted Restoration Act. In finding the Restoration Act the specific statute, the Fifth Circuit misapplied Supreme Court precedent, misread the provisions of IGRA, and employed various non-sequiturs.

After citing *Crawford Fitting Co. v. J. T. Gibbons, Inc.*, 482 U.S. 437, 442 (1987) and *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), the Fifth Circuit decided that the Restoration Act was the specific statute because it applies to two Indian tribes located in one state while IGRA applies to all tribes nationwide. 36 F.3d at 1335. Neither *Crawford* nor *Radzanower* stand for such a proposition.[2] With respect to the gaming issues presented, IGRA was actually the more detailed and specific statute. The primary purpose of the Restoration Act was restoring the federal trust status of two tribes. The Restoration Act therefore covers more than gaming; it also addresses the Tribe's federal trust status, its reservation, and tribal membership. IGRA, on the other hand, is devoted entirely to one subject: "the establishment of Federal standards for gaming on Indian lands . . . ." 25 U.S.C. § 2702(3). Because IGRA covers the same ground as the Restoration Act's gaming provision, but does so in a much more detailed way, IGRA controls. "[A] precisely drawn, detailed statute pre-empts more general remedies." *Brown v. GSA*, 425 U.S. 820, 834 (1976); see also *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503-04 (1936) (when a new statute covers the whole subject of an old one, and adds new provisions, the former statute is repealed by implication).

The Fifth Circuit decided the Restoration Act was specific because Congress "stated in two separate provisions of IGRA" that it should be considered in light of other federal

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[2] In *Crawford* no conflict existed between the statutes because one dealt with witness fees while the other dealt with court-appointed expert fees. In *Ysleta I* both statutes dealt with gaming on the reservation. In *Radzanower* the court interpreted both statutes in a way that did no violence to the underlying purpose of each statute; furthermore, the Court was careful to note that the claimed injury was "hardly an insurmountable burden in this day of easy and rapid transportation." 426 U.S. at 156. Such is not the case here where a poverty-stricken tribe is prevented from significant economic activity.

law. 36 F.3d. at 1335. The first citation is to 25 U.S.C. § 2701(5), a congressional finding wherein Congress merely noted the present condition of the law concerning tribes' ability to regulate gaming activity, law which Congress amended in IGRA. The declaration of congressional policy in the very next section of IGRA sets forth the scope of such amendment: "The purpose of this chapter is to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments[.]" 25 U.S.C. § 2702(1).

The other citation is to 25 U.S.C. § 2710(b)(1)(A) which provides that an "Indian tribe may engage in . . . class II gaming . . . if such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law)[.]"[3] The litigation In *Ysleta I* was concerned with class III gaming, not class II gaming. IGRA provides that "Class III gaming activities shall be lawful on Indian lands only if such activities are located in a State that permits such gaming for any purpose, by any person, organization, or entity." 25 U.S.C. § 2710(d)(1)(B). The class II parenthetical phrase "(if such gaming is not otherwise specifically prohibited on Indian lands by federal law)" is conspicuously absent from the provisions dealing with class III gaming. Where "Congress includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed that Congress acts intentionally and purposely in disparate inclusion or exclusion." *Rodriguez v. United States*, 40 U.S. 522, 525 (1987) (citations omitted).

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[3] The Senate Report makes clear that the reference is to the Johnson Act (15 U.S.C. § 1171 et seq.). *See* S. Rep. No. 446, 100th Cong., 2d Sess. 35, reprinted in 1988 U.S.C.C.A.N. 3071, 3082.

The Fifth Circuit also found the Restoration Act to be the specific Act because IGRA did not include a blanket repealer clause, and because five years after Congress enacted IGRA it provided that IGRA would not be applicable to a tribe in South Carolina. Neither proposition supports the court's conclusion. Since the provisions of a later enacted general statute do not repeal the provisions of an earlier enacted specific statute, it is the general statute that is in need of a blanket repealer. Any conflicting provisions of later enacted specific statute would be controlling without a blanket repealer under the last in time rule and because the statute is specific. Finally, Congress did not indicate in IGRA, enacted one year after the Restoration Act, that its preemptive provisions did not apply to the Pueblo.

In view of the language and structure of IGRA, other courts have held that it governs gaming by tribes even where a prior federal statute may be thought to have established a different scheme. For example, in *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 743 F. Supp. 645, 651 (W.D. Wis. 1990), the court rejected the contention that tribes in States governed by Pub. L. 280 would be outside the scope of IGRA. *See* also *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535 (9th Cir. 1994), cert. denied, 516 U.S. 912 (1995). Again, in *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170 (10th Cir. 1991), the Tenth Circuit dealt with the argument that the Assimilative Crimes Act (ACA), 18 U.S.C. § 13, created a different set of rules than IGRA. "As the most recent and more particular enactment of federal law, IGRA controls." *Id.* at 1180 n.19.

Finally, in *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 704 (1st Cir. 1994), cert. denied, 513 U.S. 919 (1994), the First Circuit held that, despite statements in the legislative history of IGRA indicating that the Narragansett Tribe would not be covered, the unambiguous language of the

statute required its application. The Court stressed that IGRA was the subsequent statute and that its comprehensive plan should not be violated by creating an exception for a single tribe based on legislative history. 19 F.3d at 704. This is an easier case in that regard, since there are *no* statements in the legislative history of IGRA indicating that the Ysleta del Sur Pueblo would be exempt from its provisions.[4]

While each of these cases necessarily deals with a different statute and a different question of statutory reconciliation, together they illustrate that the courts have generally insisted on applying IGRA rather than the various federal statutes that preceded it. This question is of profound practical significance to the two tribes governed by the Restoration Act,[5] and widespread doctrinal importance to all litigants who must deal with clashing federal statutes.

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[4] Congress later directed a different result for the Narragansett Tribe in a specific statute applicable only to that Tribe, *see* 25 U.S.C. § 1708(b), but that statute, as well as a specific exemption subsequently enacted for the Catawba Tribe, see 25 U.S.C. § 941*l*, simply illustrate that Congress is ready to adopt a statutory remedy where an exception to IGRA's general scheme is required.

[5] In addition to the Tigua Indians of the Ysleta del Sur Pueblo, the Restoration Act also restored a trust relationship between the federal government and the Alabama-Coushatta Indian Tribes of Texas. *See* 25 U.S.C. §§ 731 *et seq.* The Alabama-Coushatta currently have litigation pending in the United States District Court for the Eastern District of Texas, asking for a declaratory judgment in determining their rights concerning gaming under the Restoration Act. *See Alabama-Coushatta Tribes of Texas v. Texas*, No. 01-CV-299 (E.D. Tex. filed Nov. 21, 2001). The provisions of 25 U.S.C. § 737 pertaining to gaming on the reservation of the Alabama and Coushatta Indian Tribes are the same as those contained in section 1300g-6.

B. The Fifth Circuit's construction of the Restoration Act's scope of gaming provision in *Ysleta I* constitutes an unconstitutional advisory opinion.

Although the Fifth Circuit wrote in Part III(A) of its opinion that Congress did not enact the gaming provisions of the Restoration Act with an eye towards *Cabazon*, *Ysleta I* at 1333-34, it did not delineate the scope of federal prohibition. Furthermore, nothing the panel may have said about scope of gaming was necessary to support its decision and is therefore dicta. See p. 10, infra. "Issue preclusion attaches only to determinations that were necessary to support the judgment in the first action." 18 C. Wright & K. Graham, Federal Practice and Procedure, § 4421, p. 192 (1981). Furthermore, it was improper for a court which lacked jurisdiction to remark on the merits of the case. *See* 18 C. Wright & K. Graham, Federal Practice and Procedure, § 4421, p. 207 (1981). Lacking a case or controversy concerning the scope of gaming because it lacked jurisdiction, the panel's dicta lacks persuasive authority as a result of the panel's unconstitutional exercise of jurisdiction. *See* U.S. Const art. III, § 2.[6]

C. The Fifth Circuit committed fundamental errors in *Ysleta I* by holding that Congress did not enact the gaming provisions of the Restoration Act with an eye towards *Cabazon*.

In order to implement what it saw as a pivotal behind-the-scenes legislative deal, the Fifth Circuit in *Ysleta I* ignored the plain language of the Restoration Act and focused on the legislative bill that was not enacted. Along the way, it refused to follow this Court's guidance in interpreting laws

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[6] Cf. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 93-94 (1998) (Scalia, J.) (rejecting the use of "hypothetical jurisdiction" to decide merits question before reaching jurisdictional issues).

dealing with Indian tribes, displayed indifference to the legislative procedure, and rendered portions of the Restoration Act incapable of reasoned application. Because the Fifth Circuit's approach to this issue of statutory interpretation runs contrary to the guidance given by this Court and to other decisions utilizing the same terms in Indian law, it should be reviewed and reversed by this Court.

Section 107(a) of the Restoration Act contains a relatively straightforward command: "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe." 25 U.S.C. § 1300g-6(a). This command looks at gaming in terms of "activities" and prohibits the Tribe from engaging in an activity only when that activity is "prohibited" by the laws of Texas. The term "prohibited"—indeed the concept of a prohibited "activity"—had a distinct meaning in the body of Indian case law that existed at the time that the Restoration Act was passed. Beginning with this Court's decision in *Bryan v. Itasca*, 426 U.S. 373 (1976), the federal courts distinguished between regulatory and prohibitory laws for the purpose of determining the applicability of state statutes on Indian lands.

This Court endorsed the distinction in *Cabazon* by holding that because California merely regulated the type of gaming at issue (bingo), but did not prohibit it completely, the regulatory statutes did not become part of the State's criminal laws that would be binding on the reservation. *Cabazon* was decided when H.R. 318 was being deliberated by Congress. In light of *Cabazon*, section 107 was amended when H.R. 318 reached the Senate to provide, "[a]ll gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on the lands of the tribe." 133 Cong. Rec. 20,957 (1987). Thus, when Congress used the term "prohibited" in the Restoration Act, it plainly intended to codify the distinction between regulatory and

prohibitory laws adopted in Cabazon. *See Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (Congress is presumed to legislate against the background of existing law); *Green v. Bock Laundry*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring) (selecting statutory meaning "most compatible with the surrounding body of law into which the provision must be integrated").

The language of section 107(b) confirms that the *Cabazon* distinction applies to the gaming section of the Act: "Nothing in this section shall be construed as a grant of civil or criminal regulatory jurisdiction to the State of Texas." 25 U.S.C. § 1300g-6(b). Congress employed both aspects of the prohibitory/regulatory distinction from *Cabazon*. It not only directed that a gaming activity "prohibited" by state law would be prohibited on the reservation, but also declared that the State would not have "regulatory" power over gaming on the Reservation.

In other contexts, federal courts have continued to apply the *Cabazon* distinction to questions of whether particular state laws will apply on Indian reservations whether of their own accord or as part of a federal scheme. *See*, e.g., *Confederated Tribes of Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991) (applying prohibitory/regulatory distinction to state motor vehicle speeding law under Pub. L. 280); *Quechan Indian Tribe v. McMullen*, 984 F.2d 304, 307 (9th Cir. 1993) (applying prohibitory/regulatory distinction to state fireworks law under Pub. L. 280); *Pueblo of Santa Ana v. Hodel*, 663 F. Supp. 1300, 1312 (D.D.C. 1987) (applying prohibitory/regulatory distinction to state gaming law under the Assimilated Crimes Act). The Fifth Circuit's refusal to apply the prohibitory/regulatory distinction is all the more astonishing insofar as the statute here explicitly prohibits those activities that are "prohibited" under state law, but explicitly states that the State will have no "regulatory" power. 25 U.S.C. § 1300g-6(b).

The court in *Yselta I* refused to interpret the Restoration Act in accordance with its express language and with *Cabazon* and instead relied on an egregious misuse of legislative history. In the first place, in what appears to be a startling new record for over-reliance on legislative history, the court drew inferences not from the presence, but from the absence of certain comments in committee reports. After noting that the committee reports accompanying IGRA made explicit reference to *Cabazon*, the panel emphasized, "No such express recognition of *Cabazon Band* appears in the committee reports accompanying the Restoration Act." *Ysleta I*, 36 F.3d at 1333.

Worse still, *Ysleta I* focused on legislative history of a bill in the 99th Congress, H.R. 1344, that was not enacted into law. After Texas officials pressed for a strict limitation on tribal gaming, the Tribal Council adopted a Resolution urging language that all gaming "as defined by the laws and administrative regulations of the State of Texas . . . shall be prohibited." *Id.* at 1328. This exact language was then embodied in the Senate's amendments to H.R. 1344, but that bill died with the close of the 99th Congress.

The bill to restore the trust relationship between the United States and the Ysleta del Sur Pueblo was reintroduced at the outset of the 100th Congress with similar language. However, subsequent to the decision in *Cabazon*, the Senate changed the language of § 107(a):

> All gaming activities which are prohibited by the laws of the State of Texas are hereby prohibited on the reservation and on lands of the tribe.

133 Cong. Rec. 20,957 (1987). In analyzing these events, *Ysleta I* focused on the Pueblo's Resolution, which it characterized as a "political accommodation" having "critical importance to our resolution of this case," 36 F.3d at 1328 & n.2, and the notion of a legislative deal underlying the language adopted in the 99th Congress. "Congress clearly

was concerned with enacting the compromise between the Tribe, the State and [the] various members of the Texas congressional delegation." *Id.* at 1333. But *Ysleta I* failed to focus on the fact that the language used by the 99th Congress was not the language ultimately adopted by the 100th Congress. The Senate plainly changed the language of the bill to incorporate the *Cabazon* distinction.[7]

The significance of the Senate's amendment was highlighted during final action on the legislation in the House by its floor manager, Congressman Morris K. Udall, Chairman of the House Interior and Insular Affairs Committee. On August 3, 1987, Chairman Udall had the Senate's amended version of H.R. 318 read aloud in the House and asked for unanimous consent to the Senate Amendments. Representative Rhodes of Arizona, reserving a right to object, requested clarification of the Senate Amendments. In response, Representative Udall explained:

> The Senate amendment makes changes to sections 107 and 207 of the bill. These sections deal with the regulation of gaming on the respective reservations of the two tribes. It is my understanding that the Senate amendments to these sections are in line with the rational of the recent Supreme Court decision in the case of Cabazon Band of Mission Indians versus California. This amendment in effect would codify for these tribes

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[7] Testimony introduced at a hearing on the State's request for a permanent injunction in *Alabama-Coushatta Tribes of Texas v. Texas*, No. 01-CV-299 (E.D. Tex.) during the first week of April, 2002, further demonstrates that the Senate's amendment to the gaming provisions of the Restoration Act incorporate the *Cabazon* distinction. *See* Pertinent portions of the testimony of Virginia Boylan and Frank Ducheneaux in Appendix at 97a. Between 1979 and 1993, Ms. Boylan worked as an attorney on the United States Senate Committee on Indian Affairs. Mr. Ducheneaux served as counsel on Indian affairs to the Committee on Interior and Insular Affairs of the United States House of Representatives.

> the holding and rational adopted in the Court's opinion in the case.

133 Cong. Rec. 22,114 (1987) (emphasis added). After the explanation, Rep. Rhodes withdrew his objection and the bill passed by unanimous consent. *See id.*; Pub. L. 100-89, 101 Stat. 672 (1987).[8]

The Fifth Circuit relied on history from a prior session of Congress, addressing language that was not enacted, while at the same time ignoring the explanation of the relevant Committee Chairman, given at the moment of final passage and addressing the language that was actually adopted by Congress. The court was so engrossed with its notion of a legislative "deal" underlying some early versions of the bill that it failed to recognize that the language ultimately adopted was different. Legislative history does not need to be consulted when the statutory language is clear, and the key to interpretation of this statute was the pre-existing body of law drawing a distinction between prohibited and regulated activities.

D. The district court and the Court of Appeals below compounded the errors in *Ysleta I* by expounding upon the Fifth Circuit's dicta that Congress did not enact the gaming provisions of the Restoration Act with an eye towards *Cabazon*.

Petitioners argued before the district court that Part III(A) of the *Ysleta I* opinion was impermissible dicta and erroneous and that the court should apply the *Cabazon* distinction in determining whether particular gaming activities were prohibited by the Restoration Act. The court, without

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[8] Under the relevant House rules, only the Committee Chair or another authorized Committee member was permitted to make a request to act on Senate amendments by unanimous consent. 133 Cong. Rec. 2,676 (1987).

responding to the argument, stated that it was not dicta, Memorandum Opinion, Appendix at 58a. The district court did, however, express doubt about the reliance on legislative history in *Ysleta I*, Appendix at 59a-60a, but held that the decision "foreclosed" exploration of the meaning of § 107 of the Restoration Act and ordered closure of Speaking Rock, Appendix at 50a. In reaching its decision, the district court expressly adopted the earlier finding that the statutory admonition in 25 U.S.C. § 1300g-6(b) that nothing in the gaming provisions of the Restoration Act shall be construed as a grant of regulatory jurisdiction to the State was, in fact, a valid grant to the State to exercise regulatory authority over gambling on the Pueblo's reservation. Based on that finding, the district court reasoned, "The problem here is that the Defendant Tribe has not even attempted to qualify under the rules, regulations or licensing requirement of the State of Texas . . ." Memorandum Opinion, Appendix at 63a. This is precisely what Congress, by express language in section 1300g-6(b), rejected. In a one-sentence opinion, the Fifth Circuit affirmed the decision of the district court "essentially for the reasons stated in its careful, thorough September 27, 2001 Memorandum Opinion." Appendix at 2a.

CONCLUSION

Petitioners respectfully request that this Court grant its petition for a writ of certiorari

Respectfully submitted,

THOMAS M. DIAMOND, JR.*
DIAMOND RASH GORDON &
JACKSON, P.C.
300 East Main Drive
Seventh Floor
El Paso, Texas 79901
(915) 533-2277

*Counsel of Record

Attorneys for Petitioners